

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DESHAWN R. FLIPPIN,

Defendant-Appellant.

UNPUBLISHED

August 16, 2002

No. 231987

Wayne Circuit Court

LC No. 00-002773

Before: Murray, P.J., and Fitzgerald and O’Connell, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree murder, MCL 750.316(1)(a), and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to consecutive terms of life imprisonment for the murder conviction and two years for the felony-firearm conviction. He appeals as of right. We affirm.

An eyewitness testified that he saw defendant shoot at the decedent twice while the decedent was trying to run away. Defendant was quoted as saying, “first one missed, but this one won’t.” Other witnesses testified that they heard gunshots, saw the decedent lying on the ground, and saw defendant, whom they knew from the neighborhood, pointing a gun at the decedent and holding a gun as he left the scene.

Defendant raises several evidentiary issues on appeal. First, defendant argues that the trial court improperly permitted the prosecutor to elicit hearsay testimony. One witness identified defendant by the name “Candyman,” and said that she saw defendant pointing a gun at the decedent after the shooting. The witness testified that, earlier in the day, the decedent appeared to be troubled and told the witness that he had seen Candyman. The witness said she told the police that defendant and the decedent “had been arguing, yes, because that’s what I was told by [the decedent] himself.”¹

The admission of evidence is reviewed for an abuse of discretion. *People v Jones*, 240 Mich App 704, 706; 613 NW2d 411 (2000.) We believe that the decedent’s statement that he had been arguing with defendant, which was offered to explain why the decedent appeared troubled, was admissible under MRE 803(3), as a statement of the decedent’s then existing state

¹ Defendant objected to this testimony and the trial court offered to give a limiting instruction.

of mind. Where premeditation and deliberation are at issue, as they were here, it is proper to admit a murder victim's statements concerning state of mind. *People v Fisher*, 449 Mich 441, 450-451; 537 NW2d 577 (1995). Even if admission of the statement was error, however, it is not more probable than not that the error was outcome determinative in light of the eyewitness testimony that defendant chased decedent, shot and missed, and then fired again, hitting the decedent in the back. See *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). Thus, any error does not require reversal.

Defendant also argues that the trial court improperly admitted hearsay testimony from a police officer who talked to witnesses at the scene. The officer testified that a witness at the scene "indicated she heard one of the kids say Candyman." Defendant objected and the prosecutor withdrew the question. No cautionary instruction was requested or given. Plaintiff acknowledges error but argues that it did not affect the outcome. We agree. Testimony that people in the neighborhood were saying that "Candyman" had committed the shooting had already been elicited by defendant. Defendant was identified by witnesses who recognized him from the neighborhood. One witness, who saw defendant pointing a gun at the decedent, had been aware of defendant's presence in the neighborhood for eight or nine years. In light of the overwhelming evidence against defendant and the cumulative nature of the disputed testimony, it is not more probable than not that the error was outcome determinative. See *id.*

In addition, defendant argues that the trial court erred by admitting a police officer's testimony that one of the witnesses he interviewed also identified the shooter as "Candyman." Again, the prosecutor concedes that admission of the testimony was error. As noted previously, however, other witnesses testified that defendant was known in the neighborhood as Candyman, and that defendant was seen chasing and shooting the decedent before taking the gun and leaving in a waiting car. As with the previous evidentiary issues raised by defendant, it is not more probable than not that the error affected the outcome of the verdict. See *id.*

Next, defendant raises several claims of prosecutorial misconduct. "Prosecutorial misconduct issues are decided case by case." *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000). This Court generally considers prosecutorial misconduct issues "in context to determine whether the defendant was denied a fair and impartial trial." *People v Reid*, 233 Mich App 457, 466; 592 NW2d 767 (1999). In this case, however, defendant did not object to any of the challenged remarks below. Therefore, we review this issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Defendant asserts that the prosecutor made an improper appeal for sympathy when commenting on the testimony and experience of a thirteen-year-old eyewitness who testified that he saw defendant chase down and shoot the decedent, and also improperly commented on the effect of a similar experience on a member of the jury venire. While we agree the remarks were inappropriate, any prejudicial effect could have been eliminated by a curative instruction upon timely request. Therefore, reversal is not required. See *Schutte*, *supra*.

Defendant also contends that the prosecutor engaged in other misconduct, including improperly vouching for witnesses who identified defendant as "Candyman," telling the jury that identification was not an issue because it had been conclusively established by the witness' testimony, injecting extraneous issues by saying that the decedent was killed "in cold blood," remarking that defendant went "wild" during his arrest and that people could have been hurt

when he fled the police, and comparing the trial to a sporting event in which defense counsel “struck out.”

A prosecutor is afforded great latitude in closing argument. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). The prosecutor is not required to use the “blandest possible terms” to state his inferences and conclusions. *People v Launsbury*, 217 Mich App 358, 361; 551 NW2d 460 (1996). Remarks that, standing alone, could be viewed as improper do not require reversal when they are of a responsive nature. *People v Duncan*, 402 Mich 1, 16; 260 NW2d 58 (1977); *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996). For the most part, the challenged comments were responsive to the evidence and defendant’s theory and, as such, do not constitute plain error. Further, any prejudice that did occur could have been eliminated by a cautionary instruction had one been requested. *Duncan*, *supra* at 16-17. Therefore, reversal is not warranted.

Next, defendant argues that the trial court erred in allowing evidence of flight. The shooting in this case occurred on May 27, 1999. Defendant was not arrested until January 26, 2000. On that date, the decedent’s girlfriend was working at a Boston Market restaurant when defendant stopped and ordered food. The police were called and a chase subsequently ensued at high speeds, which were described as approaching 100 miles per hour. Defendant disregarded three traffic lights and three stop signs before crashing into a tree and fleeing on foot. Defendant subsequently fought with the arresting officers when he was caught. Defendant objected to the introduction of the flight evidence but, when the trial court allowed it, consented to evidence that the police learned after defendant’s arrest that defendant had an outstanding parole warrant or violation. Defendant now argues that there was no substantial connection between the shooting and the flight, and that he was prejudiced by being forced to introduce evidence of his outstanding warrant in order to explain why he was fleeing the police. Defendant also asserts that the trial court improperly instructed the jury on flight.

We review the trial court’s determination on an evidentiary issue for an abuse of discretion. *People v Smith*, 456 Mich 543, 549-550; 581 NW2d 654 (1998). A trial court’s decision on a close evidentiary question ordinarily cannot be an abuse of discretion. *Id.* The trial court’s duty to instruct is determined by the evidence. *People v Williams*, 143 Mich App 574, 579; 374 NW2d 158 (1985).

Evidence of flight is generally relevant and admissible. *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995). The term “flight” has been applied to resisting arrest. *Id.* Although defendant asserts that there was no connection between the charged offense and the alleged flight approximately eight months later, the remoteness in time is relevant to the weight of the evidence, not its admissibility. See *People v Compeau*, 244 Mich App 595, 598; 625 NW2d 120 (2000). Further, the trial court appropriately instructed the jury that evidence of flight does not prove guilt and that a person may run for either innocent reasons or because of a consciousness of guilt. See *id.* Here, where defendant fled the police and resisted arrest, the trial court did not abuse its discretion in concluding that the evidence of flight was admissible, nor did it err in instructing the jury on the use of this evidence.

Defendant also argues that the trial court’s instruction on reasonable doubt was constitutionally deficient. Defendant concedes that the trial court instructed the jury on reasonable doubt in accordance with CJI2d 3.2, but argues that the court should have instructed

on the need for near-certitude and moral certainty, as well as provided language on the need to hesitate before acting. Because defendant did not object to the instruction given by the trial court, appellate relief is precluded absent plain error affecting defendant's substantial rights. *Carines, supra*. We find no such error here. The meaning of reasonable doubt is "within the common understanding of jurors." *People v Allen*, 466 Mich 86, 87; 643 NW2d 227 (2002). "It is sufficient that a jury is instructed that proof beyond a reasonable doubt is required in order to convict a defendant. A court's failure to define the phrase 'reasonable doubt' is not a plain error requiring reversal of a defendant's conviction." *Id.* Here, the jury was properly instructed that it must find defendant not guilty unless the prosecutor proved every element of the charged crime beyond a reasonable doubt. Failure to further instruct on reasonable doubt was not error.

Defendant complains that reversal is required because of the cumulative effect of the errors alleged above. We disagree. Defendant is entitled to a fair trial, not a perfect one. *Bahoda, supra* at 292 n 64. The test to determine whether reversal is required because of cumulative error is not whether there were some irregularities, but whether the defendant received a fair trial. *People v Kvam*, 160 Mich App 189, 201; 408 NW2d 71 (1987). Here, although the prosecutor concedes error in the admission of some hearsay evidence and there were some improper comments made in closing argument, we have determined that these errors did not affect the outcome. Thus, defendant was not denied a fair trial.

Finally, defendant argues that his mandatory life sentence without the possibility of parole is unconstitutional because it violates the indeterminate-sentence principle of Article 4, § 45 of the Michigan Constitution. While the constitutional provision authorizes indeterminate sentencing, it does not prohibit determinate sentences for particular crimes. *People v Cooper*, 236 Mich App 643, 662; 601 NW2d 409 (1999). As defendant acknowledges, this Court has previously determined that a mandatory life sentence without the possibility of parole for first-degree murder does not violate Const 1963, art 4, § 45. *People v Snider*, 239 Mich App 393, 426-428; 608 NW2d 502 (2000). We are bound by the decision in *Snider*, MCR 7.215(I)(1), and we are not persuaded that it is necessary to revisit this issue.

Affirmed.

/s/ Christopher M. Murray

/s/ E. Thomas Fitzgerald

/s/ Peter D. O'Connell